

Supreme Court No. SC85627

IN THE SUPREME COURT OF MISSOURI

JEFFREY L. LAGUD,

Respondent,

v.

KANSAS CITY, MISSOURI BOARD OF POLICE COMMISSIONERS, *et al.*

Appellants.

Appeal from the Missouri Court of Appeals Western District

**SUBSTITUTE REPLY BRIEF
OF RESPONDENT JEFFREY L. LAGUD**

STEVE A.J. BUKATY, CHARTERED

8826 Santa Fe Drive, Suite 218

Overland Park, Kansas 66212

Telephone: (913) 341-1040

Facsimile: (913) 385-5535

Laborlawyers@sbcglobal.net

AND

215 W. 18th Street

Kansas City, Missouri 64108

ATTORNEYS FOR RESPONDENT

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JURISDICTION

Respondent adopts the jurisdictional statement set forth in the Substitute Appellate Brief of Respondent Jeffrey L. Lagud.

STATEMENT OF FACTS

Respondent Jeffrey L. Lagud (hereinafter, “Lagud”) takes no issue with a majority of the facts set forth in the Statement of Facts presented by Appellants. Respondent refers to the original Statement of Facts laid out in the Substitute Appellate Brief of Respondent, but wishes to provide a few additional statements of fact.

Officer James R. Carmody (hereinafter, “Carmody”) provided his version of events in a number of different settings throughout the course of the investigation and hearing. In his original Interdepartment Communication regarding this matter, Carmody wrote that Lagud escorted Russell to the holding cell, where Carmody stood behind Russell. (L.F. at 245). In that same communication, Carmody wrote that Lagud unbuttoned and unzipped the subject’s pants and removed his penis from his underwear and instructed Russell to begin urinating. (L.F. at 245). Carmody also wrote that Lagud then returned Russell’s penis back into his underwear. (L.F. at 245). In his Interdepartment Communication, Carmody never stated that he actually witnessed Lagud remove or replace Russell’s penis. (L.F. at 245). Officer Carmody later

provided a statement to Det. Dennis Coates of the Internal Affairs Unit.¹ In this Internal Affairs statement, Det. Coates asked Carmody if he had “A full view of Mr. Russell’s groin region as Officer Lagud began opening Mr. Russell’s pants?” (R.A. at A4). Carmody responded in the affirmative. (R.A. at A4). Det. Coates then asked Carmody to describe how Officer Lagud opened Mr. Russell’s pants. (R.A. at A4). Carmody stated, “He had the specimen cup in one hand, which I believe was his right hand, and with his left hand, he unbuttoned, unzipped, and reached inside the waistband of Mr. Russell’s underwear.” (R.A. at A5). When asked how Officer Lagud pulled down Mr. Russell’s pants, Carmody stated, “Well, he actually just unbuttoned and unzipped them. Then he opened up the zipper and he reached in underneath the waistband of the underwear.” (R.A. at A5). Carmody also stated that Lagud pulled Mr. Russell’s penis over the top of the waistband. (R.A. at A5). During the hearing, Carmody testified that he, rather than Lagud, escorted Russell to the urinal. (L.F. at 313). Carmody also testified that he did not actually observe Lagud unzip Russell’s pants. (L.F. at 313-314). Carmody testified that he merely assumed the manner in which Russell’s penis was extracted

¹The Board admitted the Internal Affairs statement as Lagud’s Exhibit 17 during the hearing. Lagud’s counsel referred to this exhibit during his examination of Officer Carmody. (L.F. at 315). Although Lagud’s Exhibit 17 was presented to the Board during the hearing and admitted as an exhibit, the legal file does not contain this document. As such, the exhibit is attached in Respondent’s Appendix. Citations to the Appendix will be noted by “R.A. at” followed by the relevant page number(s).

from his underwear. (L.F. at 314). Carmody also admitted that he did not have a full view of Russell's groin area. (L.F. at 315-316).

The Chief of Police for the Kansas City, Missouri Police Department, Richard D. Easley, testified that there is no specific policy which prohibits an officer from touching the penis of an arrestee while collecting a urine sample for a drug screen. (L.F. at 419-420).

POINTS RELIED UPON

- A. The Kansas City, Missouri Board of Police Commissioners erred in allowing the invocation of the witness’s Fifth Amendment rights in this matter, because the allowance caused Respondent to be denied due process, in that he was not properly afforded the opportunity to confront and cross-examine witnesses against him and the witness’s testimony should have been excluded entirely, once the witness invoked his Fifth Amendment privilege and foreclosed the opportunity for effective cross-examination.**

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- B. The Missouri Court of Appeals erred in its application of existing law, which requires deference to the credibility determinations rendered by the Board, because it unreasonably allowed acceptance of determinations which were incongruous and contrary to the weight of the evidence.**

ARGUMENT

A. The Kansas City, Missouri Board of Police Commissioners erred in allowing the invocation of the witness's Fifth Amendment rights in this matter, because the allowance caused Respondent to be denied due process, in that he was not properly afforded the opportunity to confront and cross-examine witnesses against him and the witness's testimony should have been excluded entirely, once the witness invoked his Fifth Amendment privilege and foreclosed the opportunity for effective cross-examination.

In his Substitute Appellate brief, Respondent argued that he was denied due process in his Board hearing when Mr. Russell invoked his Fifth Amendment privilege in response to the question, "Were you taking GHB on the night of September 10, 2000?" (L.F. at 343). In their Substitute Appellate Brief, Appellants cite *State of Missouri v. Blair*, 638 S.W.2d 739, 754 (Mo 1982), and assert that Lagud is not entitled to have Russell's testimony stricken. Appellants argue that because Russell refused to answer only that question, and because the cross-examination continued after the invocation of his Fifth Amendment privilege, Russell's testimony should remain intact and not be disregarded. When the Board ruled on the objection based on Russell's Fifth Amendment privilege, the Board indicated that it would ". . . stop any further questioning in this regard." (L.F. at 345). This ruling of the Board unduly restricted cross-examination concerning Russell's drug use and level of impairment on the night in question. The language used by the Board in issuing its ruling terminated an entire line of questioning, not just a single question.

Appellants also cite *United States v. Brierly*, 501 F.2d 1024, 1027 (8th Cir. 1974) by stating, “. . . the testimony of a witness on direct examination may be used against a defendant even though a witness asserts the privilege against self-incrimination upon cross-examination . . .” The Court in *Brierly* goes on to state, “If, however, the witness—by invoking the privilege—precludes inquiry into the details of his direct examination so that there is a substantial danger of prejudice, the direct testimony should be stricken in whole or in part.” *Id.* Lagud maintains that Russell’s Fifth Amendment invocation presented a substantial danger of prejudice in this matter. The crux of the charges raised against Lagud lies in the specific details of the events of September 10, 2000. Lagud’s testimony that he never touched Russell’s penis is weighed against Russell’s testimony regarding the exact same event. The ability of Russell to accurately recall details of that night is paramount. As such, the preclusion of inquiry into issues which could directly affect the ability of Russell to recall events of that evening, such as drug use, poses a substantial danger of prejudice to Lagud. Due to the ruling of the Board, Lagud’s counsel was precluded from further questioning “in this regard.” In the context of the hearing, the Board not only ruled on the single question regarding GHB, but it foreclosed all related testimony. As a result, Lagud’s counsel was not allowed to elicit testimony which could have cast justifiable doubt on Russell’s ability to recollect pertinent events of the evening.

In their brief, Appellants go into great detail concerning the subjects of Russell’s testimony following his Fifth Amendment invocation. Although Russell answered questions concerning a variety of topics, he did not testify about the extent of his drug use on September 10, 2000, his history of drug use, or the affects of drug use on his ability to remember the

events of the evening. The foreclosure of testimony regarding these topics as a result of Russell's Fifth Amendment invocation is the basis for Respondent's argument in this matter. Because Russell invoked his Fifth Amendment privilege in response to a question about drug use, and because the Board ordered Lagud's counsel to stop questioning "in that regard," Lagud's counsel was unable to question Russell about all matters relating to his drug use. This testimony would have had a direct bearing on Russell's ability to recall the events of the night in question. Therefore, Russell's Fifth Amendment invocation presented a substantial danger of prejudice to Lagud and Russell's testimony on direct should be stricken.

B. The Missouri Court of Appeals erred in its application of existing law, which requires deference to the credibility determinations rendered by the Board, because it unreasonably allowed acceptance of determinations which were incongruous and contrary to the weight of the evidence.

In responding to Respondent's second point relied on in his Substitute Appellate Brief, Appellants correctly assert that there were only three (3) potential witnesses to the collection of the urine sample: Russell, Carmody and Lagud.

In providing an overview of the testimony of Russell, Appellants assert that, although Russell was "likely intoxicated" and "not functioning well," Russell presented an accurate rendition of the events of the evening of his arrest. Appellants state that Russell remembered being arrested by the Police and taken to the Police Station on 67th Street. In fact, Russell was taken to the Center Zone station, which is not located on 67th Street. (L.F. at 284). Appellants also assert that Russell testified that he remembered Carmody and remembered that Carmody

had not touched his penis. During that same testimony, however, Russell testified that he remembered the individual who touched his penis. Russell then proceeded to mis-identify Lagud's co-counsel as the perpetrator of this action. (L.F. at 337-340). Although Appellants present aspects of Russell's testimony which they believe present a clear and accurate recollection on the part of Russell, Appellants fail to address the numerous contradictions and instances of failure to recall which were rampant in Russell's testimony. Respondent addressed the weaknesses in Russell's testimony in detail in Respondent's Substitute Brief, and that discussion will not be repeated here.

Appellants assert that Carmody was simply a witness with "nothing to gain or lose by virtue of his testimony." The fact is, Carmody did have a motive to testify that he witnessed Lagud touch Russell's penis while collecting the urine sample. Carmody had previously represented to his supervisor that Lagud had touched Russell's penis. Carmody's allegations were the original and only basis for Lagud's internal investigation, as Russell never instigated a complaint. If Carmody subsequently changed his story and admitted that he did not see Lagud touch Russell's penis, he could potentially face charges of untruthfulness. An allegation of untruthfulness, as evidenced by the case at hand, can be devastating to the career of a Police Officer. Although Appellants would like the court to believe that Carmody was simply a witness with no vested interest in the testimony presented, Respondents assert that Carmody was compelled to maintain his original story for fear of damaging his own career with an allegation of untruthfulness. Further, the details of the evening, as presented by Carmody, are ever-evolving and so inconsistent that they are completely unreliable.

Lagud is the only witness to the collection of the urine specimen whose recollection has remained constant. Contrary to the assertions of Appellants, Lagud presented a detailed explanation of how he removed Russell's penis from his pants. (L.F. at 475). During the hearing, Lagud testified that he unbuttoned Russell's pants with his right hand and grabbed the right side of Lagud's pants and dropped them down. (L.F. at 475). Lagud then grabbed the right side of Russell's underwear and dropped them down. (L.F. at 475). Then Lagud asked Russell to begin urinating. (L.F. at 475). Appellants go to great lengths in making bold assertions of truth with regard to Lagud's testimony, with absolutely no basis in the facts presented in this case. For instance, Appellants state, "Lagud had a lot to lose and a great reason to lie." In fact, Lagud's testimony is the only testimony of a witness to the event which remained constant throughout the investigation and hearing. Appellants also state, "[N]o reputable police officer would want to be known as the cop who holds the penis of a person arrested by the police." This statement has absolutely no basis of fact presented in this case and should be disregarded as a baseless assertion by Appellants.

Appellants also state that Police Officer Ralph M. Stewart testified that there had never been any training allowing a drug recognition expert to hold a man's penis. On the other hand, Chief Easley testified that the Department has no specific policy which tells an officer that he is not to touch an arrest's penis while giving a drug screen. (L.F. at 420). Officer Bewick, who is a Drug Recognition Expert, also testified that he was not aware of a policy stating that officers could not touch the penis of an arrestee while collecting a urine sample. (L.F. at 453-454).

The Board heard testimony from three (3) potential witnesses to the collection of Russell's urine sample. The testimony of Russell should have been stricken once he invoked his Fifth Amendment privilege. If not, it was incredible and based on a dubious ability to recall. The testimony of Carmody was inconsistent and completely unreliable. Finally, the testimony of Lagud was the only testimony which remained constant throughout the investigation and subsequent legal proceedings. Following the hearing, the Board issued credibility determinations concerning Carmody and Russell which were contrary to the weight of the evidence and not worthy of the deference afforded by the Court of Appeals.

CONCLUSION

For the reasons set forth herein, Respondent respectfully requests that the Court reverse the decision of the Court of Appeals and reinstate the Opinion of the Circuit Court of Jackson County.

Respectfully submitted,

STEVE A.J. BUKATY, CHARTERED

8826 Santa Fe Drive, Suite 218

Overland Park, Kansas 66212

and

215 W. 18th Street

Kansas City, Missouri 64108

Telephone: (913) 341-1040

Facsimile: (913) 385-5535

E-Mail: Laborlawyers@sbcglobal.net

By: _____
Steve A. J. Bukaty #08749

By: _____
Sean P. McCauley #52483

ATTORNEYS FOR RESPONDENT

CERTIFICATE OF SERVICE

The undersigned hereby certifies that two (2) true and correct copies of the foregoing Reply Brief of Respondent Jeffrey L. Lagud were mailed, overnight delivery, this ____ day of February, 2004, addressed as follows:

Dale H. Close
Attorney at Law
14315 East 97th Terrace
Kansas City, Missouri 64139-1127

Sean P. McCauley

CERTIFICATE OF COMPLIANCE

The undersigned, pursuant to Missouri Rule of Civil Procedure 84.06(c), certifies that the foregoing Reply Brief of Respondent Jeffrey L. Lagud complies with the limitations set forth in Missouri Rule of Civil Procedure 84.06(b).

1. The Reply Brief contains 2,619 words, per the word count of the word processing system;
2. The Reply Brief was prepared with Word Perfect 8.

Sean P. McCauley

CERTIFICATE OF VIRUS-FREE DISK

The undersigned, pursuant to Missouri Rule of Civil Procedure 84.06(g), certifies that the disk containing Reply Brief of Respondent Jeffrey L. Lagud, which was mailed to counsel for Appellants and filed with the Clerk of the Court, was scanned for viruses and is virus-free.

Sean P. McCauley